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No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether the misdemeanor offense of driving a vehicle while intoxicated under Nevada state law is a "serious" crime to which the right to jury trial applies.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I Post-Baldwin Tests Used to Determine and Analyze the Right to Trial by Jury	1
II This Court Has Determined That DWI is a Serious Offense	3
III The Impact of Nationwide DWI Jury Trials	6
IV The "Bright-Line" Test	9
V Classification of the Offense by the States and Federal Government	10
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Baldwin v. New York, 399 U.S. 66 (1970) . 2, 3, 6, 8, 9, 11

Brady v. Blair, 427 F.Supp. 5 (SD Ohio 1976) 2

Callan v. Wilson, 127 U.S. 540 (1888) 4

Codispoti v. Pennsylvania, 418 U.S. 506 (1974) 1, 2

District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930) 2

Duncan v. Louisiana, 391 U.S. 145 (1968) 7, 9

Landry v. Hoepfner, 840 F.2d 1201 (CA5 1988) 2, 3

Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098 (1987) 11

Mathews v. Eldridge, 424 U.S. 319 (1976) 7

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 7, 8

Morrisette v. United States, 342 U.S. 246 (1952) 5

Muniz v. Hoffman, 422 U.S. 454 (1975) 1, 11

South Dakota v. Neville, 459 U.S. 553 (1983) 4, 6

United States v. Craner, 652 F.2d 23 (CA9 1981) 2, 3

United States v. Jenkins, 780 F.2d 472 (CA4 1986) 2

United States v. Woods, 450 F.Supp. 1335 (Md. 1978) 2

Welsh v. Wisconsin, 466 U.S. 740 (1984) 2, 5, 6

FEDERAL CONSTITUTION

Amendment VI 6

STATUTES

18 U.S.C. §1 11

Labor Management Relations Act §10(1) 1

ARGUMENT

I.

Post-Baldwin Tests Used to Determine and Analyze the Right to Trial by Jury

In *Muniz v. Hoffman*, 422 U.S. 454 (1975), this Court, in determining whether a right to trial by jury existed for criminal co[illegible]pt pursuant to §10(1) of the Labor Management Relations Act, as amended, "capsulated" constitutional doctrine at 422 U.S. 475-76:

> (1) Like other minor crimes, "petty" contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial;
>
> (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary;
>
> (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial;
>
> (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Paragraph 2 is a restatement of the "nature of the offense" test, while paragraph 3 leaves the door open to consider punishment or penalties *other than* potential incarceration and fine. *Muniz* was decided the year after *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) which stated at 418 U.S. 512:

> Since that time, our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes.

This author concludes that this Court utilized the *Baldwin, infra,* test in the *Codispoti* case because only a fine and incarceration were at issue. Further, *Baldwin v. New York,* 399 U.S. 66 (1970) was relied upon as authority, which case preserved the "nature of the offense" test. *Baldwin,* 399 U.S. at 69, n.6. The "nature of the offense" test, therefore, remains viable, and the consideration of penalties other than incarceration and fine has been legitimated.

In *Welsh v. Wisconsin,* 466 U.S. 740 (1984), a warrantless home DWI arrest case, Justice White joined by Justice Rehnquist, in dissent, set out certain factors which indicated the "seriousness" of the DWI offense under consideration there. 466 U.S. at 763. Going beyond mere incarceration and fine, one factor was found to be the right to trial by jury set by the legislature, and another factor was the consequence of mandatory driver's license revocation upon conviction of DWI. Cases relied upon as authority were *United States v. Craner,* 652 F.2d 23, 24-27 (CA9 1981); *United States v. Woods,* 450 F.Supp. 1335, 1340 (Md. 1978); *Brady v. Blair,* 427 F.Supp. 5, 9 (SD Ohio 1976), all DWI jury trial cases. The "nature of the offense" case of *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930) was also cited.

These lower federal court decisions, *supra,* as well as analysis set out in *United States v. Jenkins,* 780 F.2d 472 (CA4 1986) and *Landry v. Hoepfner,* 840 F.2d 1201 (CA5 1988), never rely solely on a six-month incarceration "bright-line" standard. Invariably, the "nature of the offense" test, penalties beyond incarceration and fine, and the right to trial by jury in other State jurisdictions are placed into the mix, and balanced against the six-

month standard. The lower federal courts seem reticent to adopt a rigid, fixed test, as Respondent and its *amici* would have this Court do. Even *Landry v. Hoepfner, supra,* a decision which denied the right to trial by jury in a Louisiana state case, parsed each and every non-"bright-line" test, and argued it away.

Amicus State of Nevada complains that Petitioners' authority, *United States v. Craner, supra,* did not legitimate a "collateral consequences" test because the DWI offense there at issue arises from a federal regulation, not Congress as the Nation's surrogate. Petitioners urge this case to the Court's attention because it weighs maximum penalty and other factors about equally in determining the seriousness of the offense.

This Court is urged by Petitioners to retain the reliable, clear-cut *Baldwin* test, but to allow the lower State and Federal courts, at need, as in the case at bar, to evaluate the right to trial by jury by other criteria, *supra.* There are certain offenses, like the Nevada DWI law, which cannot be properly catalogued under the "bright-line" umbrella solely; such offenses cannot be isolated from other real, societal factors and forces that unquestionably gauge them "serious." These hybrid crimes seeking "serious" status, sharing elements of the petty and the serious, should be far and few between. To even imagine a petty crime that would burst onto the American landscape as this DWI offense has done, is difficult, and even that offense has taken 10 years to ripen.

II.

This Court Has Determined That DWI is a Serious Offense

In cases decided by this Court after *Baldwin v. New York,* 399 U.S. 66 (1970), the offense of DWI and its

societal consequences has been painted in somber tones. In *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983), a DWI case allowing the use of a Defendant's refusal to submit to a blood-alcohol test before the trier of fact as evidence of guilt, the majority prefaced its decision with these words:

> The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 1715, 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

These vivid passages illuminate " . . . an offense of a grave nature, affecting the public at large; . . . ". *Callan v. Wilson*, 127 U.S. 540, 556 (1888). This section of the *Neville* case, itself amply answers *amicus* State of Nevada's assertion (Br. 21) that " . . . Driving under the influence of liquor is not an inherently evil and injurious act as the act itself does not necessarily injure another person and is not universally considered as immoral . . . "

This Court has also expressed the belief that the prevention of drunken driving was properly a *major* concern to the States. *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984); *Welsh, supra*, 466 U.S. at 755 (Blackmun, J., concurring), " . . . the child (drunk driver) is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's (drunk driver's) act." (Parentheses and content added); see also, *Welsh, supra*, 466 U.S. at 762-63 (White, J., dissenting).

Amicus State of New Jersey (Br. 21-22) concludes, without authority, that the alternate method of prosecuting drunk driving cases which focuses on 0.10% or more by weight of alcohol in the driver's blood, and de-emphasizes evidence of driving difficulty, field sobriety tests, and physical signs of intoxication. indicates that drunk driving is not a *malum in se* offense. On the contrary, this alternate, easily provable method of conviction attests the firm intent of every State to convict drunk drivers and deter others. See *Welsh, supra*, 466 U.S. at 763 (White, J., dissenting). It does not follow that an offense ceases to be "serious" or one *malum in se* just because a State makes the imminently logical choice to crack down on offenders by a surer, more efficient method of proof.

The cases of this Court, as few as they are, on DWI-related issues, clearly reflect the Nation's perception that the nature of the offense of DWI is "serious", a *malum in se* crime that is "immoral in its nature and injurious in its consequences." Compare, *Morrisette v. United States*, 342 U.S. 246 (1952). Indeed, Respondent and its *amici* cite no case from this Court which states that DWI, as presently constructed in most State jurisdictions and by the federal government, is not a crime *malum in se*; Petitioners have,

484.3792(1)(A)(2)) are far more embarrassing than 2 days in jail, and evoke significantly more public scorn and obloquy. Plea bargaining with a drunk-driving defendant is prohibited by statute (N.R.S. 484.3792(3)) unless the prosecuting attorney knows that the charge is not supportable.

Those and other "collateral consequences" in the State of Nevada set the drunk driving offense apart as a special crime. No offense in modern memory (except perhaps the death penalty) has evoked such public outcry and concern. To apply a strict "bright line" test is simply to mask and ignore "collateral consequences" that legitimately sanction and punish the convicted offender, especially those provisions which permit 2 previous non-jury drunk-driving misdemeanor convictions to boost a third-offense misdemeanor drunk-driving case to

felony status carrying one to six years in the Nevada State Prison, one year of which is non-probationable.

These draconian "collateral consequences" are set out in N.R.S. 484.3792 and N.R.S. 483.460 (mandatory revocation of driver's license), petition for writ of certiorari filed herein (pp. 11-18).

The offense of drunk-driving, at least as defined by Nevada statute, does not neatly fit under the "bright line" Duncan umbrella; a more introspective analysis is needed here.

Lastly, the City relies on this Court's dismissal of the appeal in Bairnsfather v. Louisiana, _____ U.S. _____, 107 S.Ct. 1620, 95 L.Ed.2d 195 (1987), for want of a substantial federal question. There Bairnsfather argued in his Jurisdictional Statement that drunk-driving was a "malum in se" offense and that this

fact together with statutory punishments and loss of driver's license upon conviction made the offense "serious."

The present petition uses the classic "nose counting" test of Duncan as well as specific Nevada statutory punishment, and therein lies the difference between this case and Bairnsfather, supra.

III.

CONCLUSION

For the above-cited reasons, this Court should grant the Petition and set the issue for briefing and oral argument.

Respectfully submitted:

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IV.

CERTIFICATE OF SERVICE BY MAIL

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners,	)	No. 87-1437
vs.	)	NSCT. NO. 17940 (Blanton)
CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	)	NSCT. NO. 18065 (Fraley)

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

The undersigned hereby certifies and affirms that I am an Employee of the law office of JOHN J. GRAVES, JR., ESQ., attorney for Petitioner in the above-entitled matter, and a person of such age and discretion as to be competent to serve papers.

That on May 27th, 1988, I served three (3) copies of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF

CERTIORARI by depositing same in an enclosed envelope, first-class postage fully prepaid in the United States Mails, addressed as follows:

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Theresa J. Cole, An Employee of
JOHN J. GRAVES, JR., ESQ.

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V.

CERTIFICATE OF MAILING BY
COUNSEL FOR PETITIONER

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, vs. CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	)	No. 87-1437 NSCT. NO. 17940 (Blanton) NSCT. NO. 18065 (Fraley)

Pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, Counsel for Petitioner herein, a member of the Bar of this Court, Certifies that to his knowledge the Reply Brief in Support of Petition for Writ of Certiorari was mailed to this Court on the 27th day of May, 1988, within the permitted time to file said Reply, and that copies of the same were, on that date mailed to the North Las Vegas City Attorney's Office, Attorney General's Office, Las Vegas, Nevada,and State of

Nevada Attorney General's Office, Carson, City, Nevada.

DATED this 27th day of May, 1988.

John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.

SUBSCRIBED AND SWORN to before me this 27th day of May, 1988.

Theresa J. Cole
NOTARY PUBLIC in and for
Clark County, State of Nevada.

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THERESA J. COLE
OFFICIAL SEAL
NOTARY PUBLIC-NEVADA
CLARK COUNTY
My Appointment Expires Aug. 1, 1990